

IV. THE COMMISSION MUST IMPOSE A NONDISCRIMINATORY ACCESS REQUIREMENT FOR MTEs.

A. A Nondiscriminatory Access Requirement Will Promote Facilities-Based Competition Among Telecommunications Providers.

All telecommunications carriers should compete based on their service quality and rates. They should not succeed or fail in the market due to the fact that discrimination tilts the playing field or prevents choice altogether.⁵⁷ Therefore, for purposes of telecommunications competition and maximum tenant choice, the Commission should design rules or recommendations that adhere to and promote the principle of nondiscrimination.⁵⁸

Consistent with a nondiscriminatory access requirement, once an MTE owner or manager grants access to one telecommunications provider, the MTE owner or manager also must permit access to the MTE by competitive telecommunications providers at nondiscriminatory rates, terms, and conditions. In determining rates that are nondiscriminatory and reasonable, the Commission need only look as far as the rates that are currently paid by the ILEC for access to the MTE. In many cases, ILECs do not pay for access, and in those cases, competitors should not be required to pay either. Alternatively, an MTE owner may choose to impose

⁵⁷ See In re Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report and Order, 13 FCC Rcd 6777 at ¶ 2 (1998) ("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."); see also id. at ¶¶ 3-4 (noting that "Section 224 was designed to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television" and that the protections of Section 224 were extended to telecommunications carriers in 1996).

⁵⁸ Governance by these principles would be consistent with the goal behind the 1996 Act to "open[] all telecommunications markets to competition." S. Conf. Rep. No. 104-230, at 1 (1996).

nondiscriminatory fees on both the ILEC and the CLEC. If an ILEC refuses to pay access rates, the MTE owner may seek payment through traditional means. The fact that an ILEC may be the "carrier of last resort" for an MTE does not excuse the ILEC from its obligation to pay nondiscriminatory access fees.

Moreover, access to the MTE should be provided on a technology neutral basis. As the Commission acknowledged in the Notice, "competitive providers must be free to provide services in the manner that will enable them most efficiently to offer the services, or combinations of services, that consumers desire Achieving this functionality and flexibility may involve the use of a variety of transmission technologies."⁵⁹ Competitive services are and will continue to be offered using a variety of technologies. All technologies must be accommodated, thereby encouraging the development of alternative communications systems and allowing for flexibility. For fixed wireless carriers who use an antenna on an MTE's rooftop to serve their consumers in that building, rooftop access is necessary. For other technologies, some other type of access may be necessary. Therefore, in the implementation of its nondiscriminatory access requirements, the Commission must ensure that the requirements are technologically neutral in allowing carriers to obtain the access they need to provide their services to consumers.

All consumers should receive the benefits of competition; the nondiscriminatory access requirement should apply to both commercial and residential MTEs. Moreover, exclusive access agreements should be prohibited. Exclusivity contravenes the choice that tenants should have under the 1996 Act and restricts what could otherwise be a competitive market for telecommunications services. In fact, Congressman Markey noted during the May 13, 1999

⁵⁹ Notice, at ¶ 25.

hearing that exclusivity does not allow consumers to enjoy innovation and change because the marketplace is not allowed to work.⁶⁰

Opponents of nondiscriminatory access claim that exclusivity promotes competition by allowing one competitor a foothold in the market. To the contrary, exclusivity typically promotes the incumbent provider's entrenched position and prevents carriers from competing on the basis of service, price, and quality. In essence, the ILECs have de facto exclusive contracts in virtually all MTEs nationwide. The promotion of true competition in MTEs occurs only by permitting every telecommunications carrier the opportunity to offer service to tenants. For this reason, the Commission should reject claims from competitive carriers that exclusives or preferred provider agreements promote competition, and the Commission must prohibit MTE owners from granting exclusive telecommunications carrier access to a building. The Commission must also, at the request of the MTE owner, a telecommunications carrier, or a tenant within the MTE, require the reformation of long-term contracts and the elimination of exclusivity provisions in telecommunications contracts.⁶¹

⁶⁰ Hearing, at 73.

⁶¹ See Western Union Tel. Co. v. FCC, 815 F.2d 1495, 1501 (D.C. Cir. 1987)("[T]he Commission has the power to . . . modify other provisions of private contracts when necessary to serve the public interest."); see also In re Expanded Interconnection With Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 at ¶ 201 (1992)("The existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to 'lock up' the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment. To address this, we conclude that certain LEC customers with long-term access arrangements should be permitted to take a 'fresh look' to determine if they wish to avail themselves of a competitive alternative."), vacated on other grounds and remanded for further proceedings sub nom., Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (1994); see also Competition in the Interstate Marketplace, Memorandum Opinion and

In addition, the Commission must require MTE owners to permit carriers to install their facilities in an MTE prior to obtaining customers within the MTE. Otherwise, the delays involved in providing service caused by the need to install facilities will operate as a strong disincentive to choosing a competitive provider of telecommunications service and will cause needless delay in the time that a customer can expect to receive service. Moreover, under no circumstances should an MTE owner or manager be permitted to penalize or charge a tenant for requesting or receiving access to the service of that tenant's telecommunications carrier of choice.

Some MTE owners have expressed concern that a nondiscriminatory access requirement would eliminate the MTE owners' control of access to the building. However, a nondiscriminatory access requirement would not replace an access agreement that is negotiated between the MTE owner and competitor. Rather, a nondiscriminatory requirement simply would mandate that MTE owners must negotiate such access agreements with competitors on a nondiscriminatory basis. In other words, an MTE owner or manager still would need to negotiate an access agreement with each telecommunications carrier that requests access; however, the terms of such access would be provided on a nondiscriminatory basis per FCC regulation.⁶² Consequently, MTE owners still would be able to negotiate the terms and conditions -- on a nondiscriminatory basis -- by which competitors gain access. This would allow an MTE owner

Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992)(fresh look for 800 bundling and interexchange offerings).

⁶² Commenters assert that the terms and conditions of access agreements that were established when incumbents had a monopoly should not apply in a competitive marketplace. See, e.g., Letter from Wallick Properties, Inc. to Magalie Roman Salas, Secretary of the FCC, at 2 (filed Aug. 2, 1999). In effect, these commenters are asserting that MTE owners should be permitted to exercise their market power and extract monopoly rents from competitors. The Commission should reject this argument outright as contrary to the 1996 Act and the promotion of a competitive marketplace.

the opportunity to ensure that its property is accessed in a secure and safe manner by telecommunications competitors. WinStar supports adoption of a presumption that carriers assume the costs for repairs and payments for damages to MTE owners due to damage caused by a carrier's installation of its facilities. In short, WinStar expects to be subject to the same indemnification and other conditions of access to which the traditional utilities are subject.⁶³

Other parties have expressed concern about building safety, including the possibility of competitive access carriers causing fire and building code violations within the MTE. For example, several local governments have expressed concern that installation of wireless antennas will cause "roofs [to] collapse" or "will blow over and damage the building, its inhabitants, or passersby."⁶⁴ These concerns are absurd. The telecommunications facilities that will be installed within and on top of MTEs by competitive carriers do not pose a discernible threat to the public health and safety. The antennas used by fixed wireless carriers such as WinStar range from 1-2 feet in diameter. Installation is quick, simple, and reliable. WinStar has not experienced a situation in which a customer site antenna has "blown off" a roof or otherwise caused serious damage to real property or resulted in personal injuries to tenants of MTEs. Consequently,

⁶³ Utilities have been present in buildings for generations. The services typically provided by utilities, such as gas and electric services, present far greater hazards than the installation of telecommunications systems. To argue that competitive telecommunications providers should be barred from MTEs because of potential hazards does no more than foster discrimination in favor of the incumbents.

⁶⁴ Identical letters were filed by a number of local governments. See, e.g., Letter from Wayland Township to William E. Kennard, Chairman, FCC, at 1 (filed July 26, 1999); Letter from City of Longview Texas to William E. Kennard, Chairman, FCC, at 2 (filed July 26, 1999); Letter from City of Walker to William E. Kennard, Chairman, FCC, at 1 (filed July 26, 1999).

placement of WinStar's small, unobtrusive antennas on MTE rooftops would not result in any danger to MTEs or their inhabitants.

Local government entities also claim that the Commission lacks authority to "preempt state and local building codes, zoning ordinances, environmental legislation and other laws affecting antennas on roofs."⁶⁵ However, as discussed in more detail in Section IV.B., infra, the Commission has broad authority under Titles I, II, and III of the Communications Act to implement rules in order to promote competition as intended by the 1996 Act. Thus, it is well within the Commission's authority to preempt State or local restrictions that impede competition for the provision of telecommunications services.

Finally, parties assert that if nondiscriminatory MTE access is granted, "you may have 100 companies allowed to place . . . their antennas on the roof."⁶⁶ Again, these concerns are absurd. MTE owners are not likely to be inundated with requests from every telecommunications competitor for access. Competitors will request access only where the economics of the building support providing service to the MTE. The costs attending the installation of telecommunications facilities within an MTE dictate that the endeavor will not be undertaken unless consumer demand within the MTE is sufficient to recoup those costs. Logically, the number of carriers seeking to install facilities within an MTE will be limited by the number of services to which potential tenant customers will subscribe due to the capital costs associated with deployment. In those States that require MTEs to provide access to competitors on a nondiscriminatory basis, MTE owners have not complained that too many competitors are seeking access to their property. In Texas and

⁶⁵ Letter from Wayland Township to William E. Kennard, Chairman, FCC (filed July 26, 1999).

⁶⁶ Letter from City of Westland to William E. Kennard, Chairman, FCC (filed July 28, 1999).

Connecticut, for example, where nondiscriminatory access has been required by statute since 1994 and 1995, respectively, "antenna farms" have not "sprouted" on every MTE rooftop.

Nevertheless, in the unlikely event that space limitations become a problem, it is appropriate to address them on a case-by-case basis in a nondiscriminatory manner. Available remedies include limits on the time that carriers may reserve unused space within a building without serving customers and requirements that carriers share certain facilities.

In sum, the implementation of a nondiscriminatory access requirement, as outlined above, will ensure a level playing field for competitive telecommunications providers, and will promote telecommunications competition to all Americans, as intended by the 1996 Act.

B. The Communications Act Already Provides The Commission With The Necessary Jurisdiction To Impose A Nondiscriminatory Access Requirement For MTEs.

The Commission has significant discretion and authority to regulate within the scope of its expertise. The Commission's scope of authority is not limited to only those matters expressly stated in the Communications Act. Rather, Congress gave the Commission broad authority to regulate the entire communications industry. In addition, the 1996 Act is clear that the Commission should tear down barriers to local competition and promote the availability of advanced communications services to all Americans. Indeed, Congressman Pickering stated at the hearing on May 13, 1999, that Congress gave the Commission broad authority and flexibility

to address MTE access issues.⁶⁷ Congressman Pickering also sent a letter to Chairman Kennard emphasizing this very same point.⁶⁸

1. The Commission Has Substantive Jurisdiction Pursuant To Title I.

Section 1 of the Communications Act of 1934, as amended, ("the Act") establishes the purpose of the Act and the creation of the FCC. It states that the FCC was created by Congress to regulate interstate and foreign wire and radio communications so as to make available to all people of the U.S. a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service."⁶⁹ Section 2(a) of the Act provides the FCC with its subject matter jurisdiction over all interstate and foreign communication by wire and radio.⁷⁰ Section 3(52) defines wire communication or communication by wire as "the transmission of writing, signs, signals . . . including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."⁷¹ The definition of radio communication in Section 3(33) includes an identical reference to instrumentalities concerning transmission by radio.⁷² These provisions constitute a comprehensive jurisdictional mandate for the FCC to regulate radio and wire communications within MTEs. Section 4(i) also provides the Commission extensive authority to "perform any and all acts, make such rules and

⁶⁷ Hearing, at 84-85.

⁶⁸ Letter from Representative Charles W. ("Chip") Pickering to The Honorable William E. Kennard, Chairman, Federal Communications Commission, dated August 5, 1999, attached hereto as Exhibit P.

⁶⁹ 47 U.S.C. § 151.

⁷⁰ Id. § 152(a).

⁷¹ Id. § 153(52) (emphasis added).

⁷² Id. § 153(33).

regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."⁷³ Titles II and III of the Communications Act provide similar authority. Section 201(b) states that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Likewise, Section 303(r) grants broad authority to the Commission for the regulation of the use of radio spectrum and specifically permits the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act"

These Sections in the Act afford the Commission subject matter jurisdiction over wire and radio communications within MTEs. Such communications are not severable from intrastate communications; for this reason, the Commission's subject matter jurisdiction over MTE access is not limited by Section 2(b). Moreover, these Sections also provide the Commission with clear subject matter jurisdiction over access to MTEs for the purpose of providing communications services to MTEs. Intra-building wire, riser conduits, and other facilities in buildings are "instrumentalities" for the provision of competitive telecommunications services to consumers in MTEs. The Commission thus has jurisdiction over these facilities pursuant to Section 3(33) and 3(52) as set forth above.

Similarly, the Commission has held that "the provision of central office space for physical collocation is incidental to communications, thus rendering it a communications service under

⁷³ Id. § 154(i).

Section 3 of the Communications Act"⁷⁴ It further explained that "[o]fferings are incidental to communications and therefore are communications themselves, if they are an integral part of, or inseparable from, transmission of communications."⁷⁵ Access to the instrumentalities in an MTE is an integral part of and inseparable from providing telecommunications services in MTEs. This is reflected in Section 224, which recognizes the importance of access to "rights-of-way" for competitors. Just as competitors need access to utilities' "rights-of-way" -- both over public and private property -- competitors need access to MTE roofs, riser conduit, NIDs, and telecommunications closets to serve consumers in MTEs. The Commission has the jurisdiction to ensure that access to these "instrumentalities" of interstate and foreign wire and radio communications is made available to telecommunications carriers on a nondiscriminatory basis.

2. The Commission Has In Personam Jurisdiction Over Building Owners And Managers.

a. The Communications Act Provides Jurisdiction Over Building Owners And Managers.

Section 2(a) provides the FCC with in personam jurisdiction over all persons engaged within the United States in interstate and foreign communication by wire or transmission of energy by radio.⁷⁶ The "all instrumentalities" clause of Sections 3(33) and 3(52) permits the Commission to prescribe regulations that are binding upon MTE owners and managers. As explained above, access to certain facilities such as intra-building wire or riser conduit within

⁷⁴ In re Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, Second Report and Order, 12 FCC Rcd 18730, at ¶ 20 (1997).

⁷⁵ Id. The Commission's determination that physical collocation is a common carrier service was derived under a separate analysis. See id. at ¶ 21.

⁷⁶ Id.

MTEs is instrumental to providing communications services to tenants in MTEs. To the extent that MTE owners and managers either control or own these "instrumentalities," they are subject to the FCC's jurisdiction. In sum, a person is "engaged in communication by wire [or radio]" and therefore is subject to the Commission's jurisdiction under Section 2(a), by virtue of owning or controlling an "instrumentality" of communication by wire or radio -- in this case, the intra-building wire, riser conduit and other facilities.

This is consistent with Commission precedent. The Commission exercised in personam jurisdiction over MTE owners when it preempted lease arrangements that prohibited tenants from using Section 207 devices within their leasehold.⁷⁷ In addition, the Part 68 rules also demonstrate the Commission's in personam jurisdiction over MTE owners where, for example, the Commission prescribes limits on a MTE owner's ability to determine the location of a demarcation point.⁷⁸ In sum, the Commission's jurisdiction to regulate wire or radio communications reaches those persons who control or own instrumentalities to such communications. Hence, the Commission has in personam jurisdiction to regulate MTE owners and managers to the extent that their activities are integral to the communications services and systems provided within their properties.

⁷⁷ In re Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices; Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, Second Report and Order, 13 FCC Rcd. 23874, at ¶ 29 (rel. Nov. 20, 1998) ("OTARD Second Report and Order").

⁷⁸ See 47 C.F.R. § 68.3.

b. Commission Regulation Of Building Owners And Managers Is Reasonably Ancillary To Several Provisions In The Communications Act.

Even where the Communications Act does not expressly regulate, the courts have recognized and the Commission has exercised its "ancillary" jurisdiction to regulate. Most recently, the Supreme Court explained the broad basis of the Commission's authority, noting that "even though 'Commission jurisdiction' always follows where the Act 'applies,' Commission jurisdiction (so-called 'ancillary' jurisdiction) could exist even where the Act does not 'apply.'"⁷⁹ One example of the Commission exercising its ancillary jurisdiction was its regulation of cable television before Congress enacted Title VI of the Communications Act. Although cable systems were not licensed by the Commission, the Commission found that they engaged in "interstate communication by wire" and, hence, were subject to the Commission's jurisdiction.⁸⁰ Moreover, the Commission defined cable television as an interstate communications service despite the fact that the cable facilities did not cross State lines. It concluded that "a communications service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one State."⁸¹ The Commission also explained that Sections 4(i) and 303(r), *inter alia*, provided it broad rulemaking authority over interstate communications and persons coming within that jurisdiction.⁸² The Supreme Court affirmed the Commission's reasoning, holding that the Commission's authority to regulate cable was

⁷⁹ AT&T Corp. v. Iowa Utilities Bd., 142 L.Ed.2d 834, 850, 525 U.S. 366, [] (1999).

⁸⁰ In re Amendment of Subpart Rules, Second Report and Order, 2 FCC 2d 725, at ¶ 12 (1966).

⁸¹ Id. at 794.

⁸² Id. at 795.

"reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."⁸³ The Court confirmed the Commission's expansive authority, stating that "[w]e have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over 'all interstate . . . communication by wire or radio.'"⁸⁴ The Court found unpersuasive the argument that the Commission's authority was limited to regulating licensees, carriers, and others specifically reached by the Communications Act.⁸⁵ This initial exercise of ancillary jurisdiction was designed for the Commission to protect certain values (e.g., broadcast localism, diversity) thought to be expounded in the Communications Act. In a later case, the Supreme Court recognized the FCC's ancillary authority to promote the objectives that Congress intended by the Communications Act.⁸⁶ Specifically, the Court held that it is a valid exercise of FCC authority to assert its ancillary jurisdiction where the Commission is furthering "long-established" regulatory and policy goals.⁸⁷

As discussed above, the Commission's jurisdiction reaches MTE owners and managers, even though they are not licensed by the FCC, due to their provision of essential components ("instrumentalities") of communications systems within MTEs pursuant to Sections 3(33) and 3(52) of the Communications Act. Ancillary jurisdiction arises where, as here, the Commission

⁸³ See United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

⁸⁴ Id. at 173.

⁸⁵ Id. at n.37.

⁸⁶ See United States v. Midwest Video Corp., 406 U.S. 649, 667 (1972), reh'g denied, 409 U.S. 898 (1972).

⁸⁷ Id. at 669.

has jurisdiction. It supplies guidance and limitations as to how the jurisdiction is to be exercised where the statute does not do so directly.

The provision of nondiscriminatory MTE access is reasonably ancillary to accomplish several provisions in the 1996 Act. First, Section 224 provides telecommunications competitors access to utilities' "rights-of-way," among other things.⁸⁸ The intent of this Section is to ensure that competitors have access to essential facilities to provide competitive services. Even if Section 224 were thought not to apply directly, essential facilities, such as intra-building wire, riser conduits, and NIDs owned or controlled by MTEs, are reasonably ancillary to the implementation of Section 224. Furthermore, it is reasonably ancillary to regulate the salient activities of MTE owners and managers because they own or control these essential components.

Second, Section 706 requires the Commission to promote deployment of advanced telecommunications capability to all Americans in a timely fashion.⁸⁹ The Commission recognized that if a significant portion of units in MTEs is not accessible to competitive providers of broadband, that fact could seriously detract from local competition in general and the achievement of broadband availability to all Americans in particular.⁹⁰ WinStar, as well as other facilities-based carriers, are providing advanced services to consumers; however, as WinStar has demonstrated, access to MTE tenants is necessary and in many instances is difficult or impossible to obtain. Thus, Section 706 provides the Commission with the authority directly or as a matter of ancillary

⁸⁸ See 47 U.S.C. § 224.

⁸⁹ See Section 706(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 153 (1996).

⁹⁰ In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, Report, 14 FCC Rcd 2398, ¶ 104 (1998).

jurisdiction to implement a nondiscriminatory access requirement to promote the deployment of advanced telecommunications capability.

Finally, Section 207 provides that the Commission shall:

promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.⁹¹

The Commission determined that it would not limit Section 207 to only those video services specifically described in the statute. Rather, it took an expansive view of the types of video programming service providers intended to be protected by Section 207 and included video service providers not specifically delineated in Section 207, such as LMDS licensees.⁹² Fixed wireless carriers may offer services like those contemplated by Section 207 through the provision of Internet access or other broadband services.⁹³ Indeed, fixed wireless carriers will compete against those video providers, like LMDS licensees, that already receive protection under Section 207, but are permitted to offer a broader array of services.⁹⁴ Just as the Commission used its

⁹¹ Section 207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996). As demonstrated above, pursuant to Section 207, the Commission has exercised direct jurisdiction over MTE owners and managers.

⁹² See Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276, at ¶ 30 (1996) ("OTARD Order").

⁹³ While the Commission declined to adopt a broad definition of "video programming services," it did determine to include those services that offer services similar to television broadcast stations. Technology is rapidly changing, and the Internet is beginning to carry broadcast-type services. The Commission should acknowledge this and include facilities-based carriers offering Internet services within the ambit of Section 207.

⁹⁴ In re Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz

authority to expand the scope of Section 207 to include wireless devices not specifically mentioned in the statute, the Commission has the authority to construe Section 207 to include all fixed wireless devices within its ambit. Alternatively, it can articulate a regulatory program for other services patterned after its Section 207 regulations, based upon ancillary jurisdiction. Section 207 provides the Commission with the underlying principles to restrict all MTE prohibitions on fixed wireless devices and to require nondiscriminatory MTE access for all fixed wireless providers, just as Title III was applied to cable regulation three decades ago.

C. There Is No Constitutional Impediment For The Commission To Adopt A Nondiscriminatory Requirement.

The Commission may impose a nondiscriminatory access requirement on MTE owners and managers without triggering the Fifth Amendment "takings" clause in the U.S. Constitution. Pursuant to the takings clause and relevant Supreme Court precedent, a property owner has the right to exclude telecommunications carriers from his building. However, once the building owner allows one telecommunications carrier into the building, the question becomes one not of forced entry, but of discrimination. And, it is within the authority of the Commission to regulate to ensure nondiscrimination among competing providers of telecommunications services. Finally, even if a nondiscriminatory requirement is considered a taking, the Commission has the authority to effect a taking and require compensation.

Frequency Band, to Establish Rules and Policies for LMDS and for Fixed Satellite Services, First Report and Order and Fourth Notice of Proposed Rulemaking, 11 FCC Rcd. 19005, at ¶ 15 (1996)(describing the "wealth of innovative services" made possible by LMDS).

1. A Nondiscriminatory Requirement Is Neither A Per Se Nor A Regulatory Taking.

The Fifth Amendment of the U.S. Constitution provides: "[N]or shall private property be taken for public use, without just compensation." Generally, there are two types of Fifth Amendment takings: "per se" takings and "regulatory" takings.⁹⁵ Where the government authorizes the permanent physical occupation of property, a per se taking is involved.⁹⁶ Where the government merely regulates the use of property, a court will examine the factors from Pennsylvania Central Transportation Co. v. City of New York⁹⁷ to determine whether a regulatory taking has occurred.⁹⁸ These factors are: (1) the character of the governmental action; (2) its economic impact; and, (3) its interference with reasonable investment-backed expectations.⁹⁹ A nondiscriminatory building access requirement is neither a per se nor a regulatory taking.

In Loretto v. Teleprompter Manhattan CATV Corporation,¹⁰⁰ the Supreme Court held that a New York statute which prohibited landlord interference with installation of cable television facilities on the landlord's property involved a permanent physical occupation and, therefore, was a taking.¹⁰¹ (The Court did not reach whether it was an unconstitutional taking because it did not determine whether the compensation provided was just.) However, a per se taking is not

⁹⁵ Yee v. City of Escondido, 503 U.S. 519 (1992).

⁹⁶ Id. at 522.

⁹⁷ 438 U.S. 104 (1978).

⁹⁸ Id. at 124.

⁹⁹ Id.

¹⁰⁰ 458 U.S. 419 (1992).

¹⁰¹ Id. at 441.

involved where the government regulates the terms and conditions of a voluntarily agreed-to lease arrangement.¹⁰² In Yee, a combination of nondiscrimination requirements and rent control was found to not constitute a per se taking because the landlord voluntarily opened its property to occupation by mobile home owners.¹⁰³ The Supreme Court noted that the statute "merely regulate[d] petitioner's use of their land by regulating the relationship between landlord and tenant."¹⁰⁴ Moreover, the property owner could stop renting his property to mobile home owners and thereby avoid the regulations.¹⁰⁵ Likewise, FCC v. Florida Power¹⁰⁶ established that a utility company was not required to give cable operators access to utility poles, but once it did, the Commission could regulate the terms and conditions of access.¹⁰⁷ Thus, it is clear that a per se taking has not occurred when the government merely regulates the terms and conditions of an agreement to which the private property owner has voluntarily agreed.

Similarly, a nondiscriminatory access requirement would apply once a building owner agrees to allow a telecommunications provider access to the building. It does not provide access in the first instance like the statute in Loretto. As the Commission stated in the Second Report and Order in the OTARD proceeding, "once a property owner voluntarily consents to the physical occupation of its property it can no longer claim a per se taking if government action merely

¹⁰² See Loretto, 458 U.S. at 441 ("We do not . . . question . . . the . . . authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property."); see also FCC v. Florida Power Corp., 480 U.S. 245 (1987).

¹⁰³ Yee, 503 U.S. at 528.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ 480 U.S. 245 (1987).

¹⁰⁷ Id. at 252-54.

affects the terms and conditions of that occupation."¹⁰⁸ Because a nondiscriminatory access requirement would not compel a physical invasion (that is, the initial "invasion" remains the choice of the landlord), the requirement is not properly considered a per se taking.

Indeed, a nondiscriminatory access requirement would merely regulate the conditions by which a building owner allows a telecommunications provider to access his building. Of course, the landlord retains the power to restrict access for all telecommunications providers equally, and consequently, may avoid the nondiscriminatory access requirement.¹⁰⁹ Hence, such a requirement merely regulates a voluntarily agreed-to occupation and is not a per se taking.

Moreover, a nondiscriminatory access requirement is not a "regulatory" taking. To determine whether a regulatory taking has occurred, a court will consider the three factors from Penn Central.¹¹⁰ First, it will consider the character of the government action. In this instance, a nondiscriminatory building access requirement promotes the substantial government interest of choice and competition in the telecommunications marketplace. The 1996 Act was intended to provide competition in telecommunications markets for all American consumers. A nondiscriminatory access requirement will allow fixed wireless carriers, like WinStar, to reach consumers in MTEs. The result will be more competition for incumbents, just as Congress

¹⁰⁸ OTARD Second Report and Order, at ¶ 22.

¹⁰⁹ It should be noted that nondiscrimination requirements have previously been found not to constitute a taking. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964). Indeed, the Supreme Court stated in Yee, "[b]ecause they voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals." Yee, 503 U.S. at 531 (citing Heart of Atlanta Motel, 379 U.S. at 261; PruneYard Shopping Center v. Robins, 447 U.S. 74, 82-84 (1980)).

¹¹⁰ 438 U.S. 104, 124 (1978).

intended with the enactment of the 1996 Act. Second, a court will consider the economic impact of the regulation. The economic impact of nondiscriminatory access on building owners will not be significant, especially when one considers that the ILECs, in most cases, have access for free, generating no compensation for the building owner. Additionally, competitive carriers do provide compensation to building owners, as negotiated by the entities. Indeed, allowing competition among carriers within MTEs will enhance the value of the property to prospective tenants. Third, a court will consider the regulations' interference with reasonable investment-backed expectations. Expectations will not be altered, as fixed wireless carriers are willing to compensate MTE owners for providing nondiscriminatory access to their buildings. Moreover, most buildings were built before the advent of telecommunications competition. Thus, these building owners have no investment-backed expectation of compensation for such use. Although a nondiscriminatory MTE access requirement will impact exclusive agreements, the Commission acknowledged in the OTARD Second Report and Order that regulatory adjustments to private contractual relationships do not necessarily transform that regulation into a taking. Thus, a nondiscriminatory access requirement is not a "regulatory" taking.

2. A Nondiscriminatory Access Provision Is Consistent With The Commission's OTARD Second Report and Order.

A nondiscriminatory requirement for access to MTEs is consistent with the OTARD Second Report and Order which recognizes that where "the private property owner voluntarily agrees to the possession of its property by another, the government can regulate the terms and conditions of that possession without effecting a per se taking."¹¹¹ As explained above, a

¹¹¹ OTARD Second Report and Order, at ¶ 18. WinStar is a party to a Petition for Reconsideration of the Order which is discussed in Section VIII, infra.

nondiscriminatory requirement would be imposed only when building owners and managers have provided access to their MTEs to a telecommunications provider. In other words, the Commission is merely regulating the use of such property once the building owner voluntarily enters into an arrangement whereby it permits access to a telecommunications provider. Thus, a nondiscriminatory MTE access requirement is consistent with the Commission's findings in the OTARD Second Report and Order.

3. Bell Atlantic Telephone Companies v. FCC Is Inapposite.

In Bell Atlantic Telephone Companies v. FCC,¹¹² the U.S. Court of Appeals for the D.C. Circuit held that the FCC did not have the authority to implement rules requiring ILECs to set aside a portion of their central offices for occupation and use by competitive access providers.¹¹³ The court held that where an agency authorizes "an identifiable class of cases in which the application of a statute will necessarily constitute a taking," the agency's authority is narrowly construed to defeat such an interpretation unless the statute grants express or implied authority to the agency to effect the taking.¹¹⁴ The court determined that the Commission's requirement for physical collocation raised constitutional concerns under the Fifth Amendment "takings" clause; therefore, the court held that the Commission's statutory authority had to be construed narrowly because the Act did not provide express authority for the requirement.¹¹⁵ The court stated that

¹¹² 24 F.3d 1441 (D.C. Cir. 1994).

¹¹³ Id. at 1445.

¹¹⁴ Id. Implied authority may be found only where "the grant [of authority] itself would be defeated unless [takings] power were implied." Id. at 1446 (quoting Western Union Tel. Co. v. Pennsylvania R.R., 120 F. 362, 373 (C.C.W.D. Pa.), aff'd, 123 F. 33 (3d Cir. 1903), aff'd, 195 U.S. 540, (1904)).

¹¹⁵ Id. at 1446.

while Section 2(a) of the Communications Act provided the FCC with the power to order physical connections between carriers, the statute did not supply a "clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices."¹¹⁶

The precedent in Bell Atlantic is inapplicable in the context of nondiscriminatory MTE access. As described above, a nondiscriminatory access requirement does not constitute a taking. For this reason alone, Bell Atlantic does not apply. Moreover, the Bell Atlantic decision, by its terms, applies only where the rule would "necessarily constitute a taking."¹¹⁷ Given the reasonable likelihood that a nondiscriminatory MTE access requirement would not constitute a taking, it would be strained to classify it to "necessarily" constitute a taking. In the unlikely event that a nondiscriminatory MTE access requirement is a taking, it is not likely that such a taking will be deemed unconstitutional because, as explained below, a nondiscrimination provision should be accompanied by a reasonable compensation obligation.

Moreover, in another opinion subsequent to the Bell Atlantic decision, the D.C. Circuit explained that a narrow construction to avoid constitutional difficulties is warranted "if such a construction is not plainly contrary to the intent of Congress."¹¹⁸ A narrow construction of the Communications Act to preclude FCC nondiscriminatory MTE access rules would be plainly contrary to the intent of Congress,¹¹⁹ especially in light of Congress' passage of the 1996 Act. The 1996 Act evidences a Congressional goal of providing access to competitive sources of

¹¹⁶ Id.

¹¹⁷ Id. at 1445.

¹¹⁸ Chamber of Commerce of the United States v. FEC, 69 F.3d 600, 605 (D.C. Cir. 1995)(citing Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994)).

¹¹⁹ See Discussion of the Commission's broad statutory authority to promote competition in Section IV.B., supra.

telecommunications services for all Americans.¹²⁰ Congress clearly intended for all Americans to enjoy local competition, including those working and living in MTEs. Indeed, Sections 224, 706, and 207, as discussed above, were all intended to promote competition. These sections, among other procompetitive sections in the 1996 Act, adequately demonstrate the Commission's broad authority to implement a nondiscriminatory MTE access requirement. Hence, a narrow construction of the FCC's authority to prevent discriminatory MTE access would run contrary to the intent of Congress as recently expressed through the 1996 Act.

Finally, on a factual basis Bell Atlantic is distinguishable from the nondiscriminatory MTE access requirement at issue herein. In Bell Atlantic, the physical collocation requirements were mandatory. However, a nondiscriminatory building access requirement would be applied only when an MTE owner voluntarily allows a telecommunications provider access to his building. In other words, the MTE owner ultimately would determine whether to be subject to the rule. The ILECs did not have this choice in Bell Atlantic. Thus, the precedent in Bell Atlantic is inapplicable to a nondiscriminatory building access requirement.

4. Even If A Nondiscriminatory Requirement Is A Taking, The Commission Has The Authority To Effect A Taking And Require Compensation. Thus, A Nondiscriminatory Requirement Would Not Violate The Fifth Amendment.

Even if a nondiscriminatory MTE access requirement is considered a taking, it is not an unconstitutional taking if just compensation is provided. In its implementation of an MTE access

¹²⁰ S. Conf. Rep. No. 104-230, at 113 (1996)(noting that the 1996 Act was intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . .").

requirement, the Commission may impose a compensation requirement on telecommunications providers for access to MTEs. Indeed, fixed wireless carriers are willing to provide compensation to building owners for MTE access.¹²¹ Certainly, fixed wireless carriers are willing to pay the rates currently paid by ILECs (which should be deemed reasonable for Fifth Amendment purposes). It should also be noted that reasonable compensation of \$1 per building has survived judicial scrutiny for building access in the cable television context (and continues to attach today in New York).

In deciding that the building owner in Loretto had experienced a compensable taking, the Supreme Court highlighted the narrowness of its holding: "our conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand."¹²² On remand, the amount of compensation of \$1.00 was not overturned. Although there was no subsequent judicial finding on the adequacy of the compensation (partly because the landlords did not apply to the Cable Commission for reasonable compensation following the Supreme Court decision, instead seeking attorneys fees), a State court did characterize it as "altogether improbable [that it would be] eventually judicially determined that the very minimal compensation landlords stand to receive under the Executive Law § 828 compensatory scheme (in most cases \$1.00) does not amount to

¹²¹ As stated by Mr. Rouhana, WinStar is not "looking for free entry" It is willing to pay reasonable, nondiscriminatory rates for entry into an MTE. See Hearing, at 72 and 76.

¹²² See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

just compensation: . . . "123 Indeed, as Justice Blackmun noted in his dissent, the practical effect of Loretto's case amounted to "a large expenditure of judicial resources on a constitutional claim of little moment."124 Therefore, it is not likely that an MTE nondiscriminatory access requirement would be found unconstitutional.

The Commission has the authority to effect a taking and to establish the minimum level of just compensation.125 First, the Commission has authority to implement Section 706, which governs the availability of advanced telecommunications capabilities. Section 706 directs the Commission to encourage the deployment of advanced telecommunications capability using, inter alia, "methods that remove barriers to infrastructure investment."126 Upon any determination that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion, the Commission is to "take immediate action . . . by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."127 Fixed wireless licensees provide advanced telecommunications services. MTE access restrictions impede delivery of those services. Section 706 gives the Commission the necessary authority to

123 Loretto v. Group W Cable, 135 A.D.2d 444, 448, 522 N.Y.S.2d 543, 546 (1987).

124 Loretto, 458 U.S. at 456, n.12.

125 See Gulf Power Co. v. United States, 998 F.Supp. 1386, 1397 (N.D.Fla. 1998) (citing Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186-94 (1985)). In Williamson County, the Supreme Court held that a takings claim was premature as long as the regulatory commission involved had not issued a final order regarding the application of the ordinance in question and because the property owners had not sought compensation through State procedures before turning to the courts. See Williamson County, 473 U.S. at 186-94.

126 Section 706(a) of the Telecommunications Act of 1996 Pub. L. No. 104-104, 110 Stat. 56, 153 (1996).

127 Id. § 706(b).

remove those restrictions and require access. If a requirement for access is deemed a taking, then the Commission's authority to effect the taking is reasonably implied by Section 706.

Second, the Commission has the authority to effect a taking by requiring nondiscriminatory MTE access to preserve the principles embodied in Section 254.¹²⁸ Section 254(a) charges the Commission with creating a Joint Board on universal service and implementing the Joint Board's recommendations.¹²⁹ Pursuant to the Joint Board's Recommended Decision, one of the principles that must guide a universal service plan is competitive neutrality.¹³⁰ Without takings authority, some carriers would be precluded from providing tenants in MTEs with those services eligible for universal service funding -- a result squarely at odds with the guiding principle of competitive neutrality. Takings authority in the MTE access context must be implied in Section 254 in order for the Commission to implement a competitively neutral universal service scheme (pursuant to the Joint Board's Recommended Decision) and thereby follow its statutory mandate. Any concern over the inadequacy of compensation is guarded against by the ability of parties to seek judicial relief under the Tucker Act.¹³¹

¹²⁸ 47 U.S.C. § 254.

¹²⁹ Id. § 254(a).

¹³⁰ Pursuant to the Joint Board's recommendation, and as directed by the statute, the Commission added the principle of "competitive neutrality" to those enumerated in §§ 254(b)(1)-(6). See Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776 at ¶¶ 46-47 (1997) ("Universal Service Order"); Federal-State Joint Board on Universal Service, Recommended Decision, 12 FCC Rcd 87 at ¶ 23 (1996).

¹³¹ See 28 U.S.C. 1491(a)(1). See Williamson County at 194-195 (1985)(quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 1018, n.21)("If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."); see also Presault v. ICC, 494 U.S. 1, 12 (1990)(noting that Congress must exhibit an "unambiguous intention to withdraw the Tucker Act remedy . . . to preclude a Tucker Act claim")(citations omitted). Nothing in the Communications Act

The Tucker Act was intended to provide parties a means to file claims against the U.S., particularly when a government agency has "taken" property without providing just compensation. The U.S. Court of Appeals for the D.C. Circuit in Bell Atlantic Telephone Companies v. FCC expressed concern with the FCC's ability to rely upon the Tucker Act as it could result in exposing the U.S. Treasury "to liability both massive and unforeseen."¹³² However, as noted in the decision, the Tucker Act remedy is presumed available unless Congress specifically precludes it.¹³³ The Communications Act does not preclude Tucker Act claims; therefore, it is a remedy available to parties if a Commission regulation is a taking and a party has not received just compensation. Moreover, the Bell Atlantic decision ignores important Supreme Court precedent that holds that the Tucker Act presumptively supplies a means of obtaining compensation for any taking that may result from a lawful regulation of an agency. In United States v. Riverside Bayview Homes, Inc., the Supreme Court addressed a factual scenario very similar to the situation here.¹³⁴ There, the Army Corps of Engineers had very broad authority to regulate "navigable waters" defined as "waters of the United States."¹³⁵ Pursuant to that authority, the Corps regulated "freshwater wetlands," which included requiring property owners of freshwater wetlands to obtain a permit from the Corps before filling those wetlands.¹³⁶ The U.S. Court of Appeals for the Sixth Circuit had narrowly construed the Corps' jurisdiction to

indicates that Congress has foreclosed a Tucker Act remedy. See Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445, n.2 (D.C. Cir. 1994).

¹³² 24 F.3d, at 1445.

¹³³ Id. at n. 2 (citing Preseault v. ICC, 494 U.S. 1, 12 (1990)).

¹³⁴ 474 U.S. 121 (1985).

¹³⁵ Id. at 123.

¹³⁶ Id. at 123-24.

regulate wetlands, explaining that a broader definition of wetlands might result in the taking of private property without just compensation.¹³⁷ However, the Supreme Court explained that:

[b]ecause the Tucker Act, which presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute, is available to provide compensation for takings that may result from the Corps' exercise of jurisdiction over wetlands, the Court of Appeals' fears that application of the Corps' permit program might result in a taking did not justify the court in adopting a more limited view of the Corps' authority than the terms of the relevant regulation might otherwise support.¹³⁸

Likewise, the Tucker Act remedy does not prohibit the Commission from using its broad authority to require nondiscriminatory MTE access. For this reason, the Bell Atlantic decision is incorrect in concluding that the Tucker Act imposes a limitation on the FCC. Rather, the Tucker Act was intended to assist where agency regulation might trigger a takings. Hence, Bell Atlantic does not limit the Commission's reliance upon the Tucker Act as a possible remedy for MTE owners if a nondiscriminatory access requirement is deemed a taking.

D. The Commission's Enforcement Of A Nondiscriminatory Access Requirement Should Be Efficient And Equitable.

In the event that an MTE owner and a competitive telecommunications provider cannot reach agreement on the terms of nondiscriminatory access, the Commission should establish the minimum compensation whereby the provider may obtain timely access to the MTE until the parties have been able to come to an agreement or have resolved their differences through a complaint proceeding. Likewise, the Commission should establish procedures whereby a competitive provider may bring a complaint to the FCC and have its complaint resolved on an

¹³⁷ Id. at 125.

¹³⁸ Id. at 128-129.

expedited basis when it encounters bad faith negotiations on the part of the MTE owner or discrimination from an MTE owner. The Commission should look to its pole attachment complaint procedures for guidance.¹³⁹ Those procedures provide for a streamlined, paper proceeding which easily could be tailored to the building access context.

When a CLEC files a complaint with the FCC, an MTE owner or manager should be required to respond within 30 days. In turn, a CLEC should have an opportunity of 20 days to file a reply. Evidence of the discrimination and the rebuttal of such evidence should be submitted to the FCC through the complaint, response, and reply; however, the Commission should maintain the option to request additional information from the parties, as well as the option to meet with the parties to attempt to settle the dispute. Nevertheless, the Commission should attempt to conclude the complaint proceeding on an expedited basis -- not more than 90 days from the filing of the complaint. These procedures, conducted on an expedited basis, will promote the goal of providing consumers in MTEs competitive choice, as intended by the 1996 Act.

**V. PURSUANT TO SECTION 224, UTILITIES MUST PROVIDE
TELECOMMUNICATIONS CARRIERS ACCESS TO RIGHTS-OF-WAY AND
RISER CONDUIT THAT UTILITIES OWN OR CONTROL.**

Congress enacted Section 224 to ensure that access to customers, through poles, ducts, conduit, and rights-of-way owned or controlled by utilities, is made available to competing providers of telecommunications services on a nondiscriminatory basis and under just and reasonable rates, terms, and conditions.¹⁴⁰ The Commission has affirmed that the term

¹³⁹ See 47 C.F.R. §§ 1.1401-1.1418.

¹⁴⁰ Section 224(f)(1) requires utilities to provide telecommunications carriers with "nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by [them]." 47 U.S.C. § 224(f)(1). Section 224(b) requires that the rates, terms, and conditions for pole attachments are "just and reasonable." *Id.* § 224(b)(1).